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No. 85-1032

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

M.J.M. EXHIBITORS, INC.,

Petitioner,

-against-

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development Corporation, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 29, 1986

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the District Court properly granted and the Court of Appeals properly affirmed the grant of summary judgment to respondents, where the undisputed facts, evidenced by the documents submitted by petitioner, demonstrate that the content-neutral 42nd Street Development Project, which petitioner challenges as violative of the First Amendment, serves substantial and important state interests unrelated to the suppression of free speech, and the condemnation plan achieves its purposes of, inter alia, eliminating blight and revitalizing the area economically, in a manner that is "no greater than is essential", in accordance with the holdings of this Court in United States v. Albertini, ___ US ___, 53 USLW 4844, 4848 (1985) and United States v. O'Brien, 391 US 367 (1968).

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COUNTER-STATEMENT OF THE CASE

This brief is submitted on behalf of respondents,* state and municipal officials, the City

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*Those respondents are:

WILLIAM J. STERN, individually and as Chairman of the New York State Urban Development

(footnote cont'd on next page)

of New York, and three private developers of the 42nd Street Development Project ("the Project"), to urge denial of a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. Petitioner, the owner of one of 406 businesses in the Project area, seeks review of a Second Circuit determination which upheld the grant of summary judgment to respondents and denied the application to enjoin the Project. The lower courts unanimously found that since the 42nd Street Development Project achieves, in a manner that is no greater than essential, important and

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* (footnote from previous page)

Corporation, WILLIAM H. DALY, individually and as Director of the Office of Midtown Enforcement of the City of New York, STEVEN SPINOLA, individually and as President of the Public Development Corporation of the City of New York, HERBERT J. STURZ, individually and as Chairman of the City Planning Commission of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE CITY OF NEW YORK, PARK TOWER REALTY CORP., TISHMAN SPEYER PROPERTIES, EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES and PLANNING INNOVATIONS, INC. The Rule 28.1 Statement appears in Respondents' Appendix.

substantial state interests, unrelated to the suppression of speech, such as the elimination of blight in this crime-ridden, economically under-utilized area, the condemnation plan does not violate the First Amendment.

A. Procedural History of the Project

The 42nd Street/Times Square area is well-known as the heart of the City's theater district and the hub of its transit network (A148-A152).* The history of the Times Square area reveals, however, that its character changed drastically throughout the years from a vital, developing region into what in 1960 was reported to be "the worst block in town"** (A151). Although efforts had been made by

*Unless otherwise indicated, numbers in parentheses preceded by the letter "A" are references to pages in the Joint Appendix submitted to the Second Circuit Court of Appeals. Numbers preceded by the letters "App" are references to the Appendix to the Petition.

**Even petitioner concedes that its business is located in an area blighted by, among other things, street crime and loitering (A245-246).

both private and public entities to revitalize the area, none came to fruition (A121, 152, App 31).

In an attempt to reverse these failed efforts, on June 27, 1980, Mayor Koch and the President of the New York State Urban Development Corporation ("UDC") entered into a Memorandum of Understanding, in which UDC and the City agreed to collaborate in the planning and redevelopment of the 42nd Street/Times Square area (A121, App 4, App 31). To implement the Plan, where necessary, UDC would acquire through condemnation the property needed to effectuate the Project (A123, 153, App 9).* The Project plan requires private investment of upwards of 1.6 billion dollars (A139).

A draft environmental impact statement was prepared and public hearings commenced (A122, App 5, App 31). The final environmental impact

*The Project area encompasses 13 acres and includes the entire blocks between Broadway and Eighth Avenue from 41st to 43rd Streets as well as additional properties on Eighth Avenue south to 40th Street. See A163.

statement (FEIS),* was completed toward the end of the summer, and the requisite hearings concluded on September 6, 1984 (A12, App 5, App 31-32). Thereafter, UDC's Directors and the New York City Board of Estimate approved the Project (A123, 158, App 5, App 32).

B. Substantive Findings of Blight and Resulting Plans for Development

As both the District Court and Court of Appeals found, numerous conditions contribute to the blight in the Project area. A number of buildings are deteriorated and empty above the first floor (A123, FEIS 2-7), and even though this central area of Manhattan is zoned for the highest density, 72% of the area's development rights are not used and 18% of what is developed is unoccupied (A123, 153,

*The two volume FEIS, which the Circuit termed "the primary document setting forth the factual basis for the Project" (App 5), was submitted by petitioner as Exhibits M and N in support of the motion for a preliminary injunction. Citations to the document are "FEIS", followed by the relevant page numbers.

FEIS 2-13, App 6-7, App 33).

As a result, tax revenues from the area are low (FEIS S-8, A160, App 7). In addition, 42nd Street between Seventh and Eighth Avenues has been among the most crime-ridden areas in the city, having seen a 53% increase in reported crimes from 1978 to 1980 (App 6, App 34, FEIS 2-81 - 2-89), with the subway stations regularly ranking number one and two in reported felony and misdemeanor complaints (App 6, FEIS 2-89 - 2-90).

These blighted conditions on and near 42nd Street demanded a comprehensive, well-integrated program to reverse the decline of the Project area. Thus, to eliminate the core of blight that has discouraged new investment for over half a century, the following goals were established for the Project:

> First, to eliminate the blight and physical decay, as well as the crime and frightening street life, that now characterizes the West 42nd Street area;
>
> Second, to preserve and restore the area's extraordinary older theaters for theatrical and upgraded movie

use, and, by so doing, to revitalize the project area as a theater and entertainment center serving tourists and all New Yorkers;

Third, to develop the project area's commercial and retail potential to produce a lively, healthy street ambience and to support the City's policy (as expressed in the new Midtown Zoning) that encourages the movement of Midtown office construction westward;

Fourth, to help upgrade public facilities in the project area, particularly the Times Square subway station;

Fifth, to increase the project area's economic contribution to the City as a whole, both through increased revenues to the City and expanded private investment and employment opportunities; and

Sixth, to restore the project area's role as a positive influence on the adjacent communities, notably the theater district, the garment center, and the Clinton residential neighborhood, and as a productive link among these communities and the expanding midtown office district (App 7-8, FEIS, S-3).

To achieve these goals, the following physical components of the Project were planned: (1) four office towers; (2) a Trade Mart; (3) a hotel with

retail space; (4) restoration of the nine landmark theaters (A124, FEIS S-4 - S-6, App 8). An integral part of the plan includes public improvements which would significantly upgrade the existing transportation network and the aesthetic and urban design quality of the Project area.

It is undisputed that aside from the physical and visual benefits to be realized from the elimination of blight and new construction, the Project will also yield significant economic benefits. In essence, the plan will spawn a transformation in that it will trigger new development, spur economic growth, provide new job opportunities, restore the architecturally significant theaters, and improve public facilities (A125, FEIS S-13, App 9, App 33).

C. Procedural History of this Action

Petitioner MJM, and three other businesses selling either sexually explicit books or 8 mm. films through coin-operated machines, commenced this action in October, 1984. Shortly thereafter, the parties filed an application, by order to show cause,

for (1) a preliminary injunction enjoining implementation of the Project; (2) a declaratory judgment that the Project violates their rights under the First and Fourteenth Amendments; and (3) such other relief as the court deemed appropriate (A5-70). In support of their application and as part of their reply, the moving parties submitted many documents describing the Project and upon which the Project approvals were based, including the FEIS and detailed factual affidavits (A68-69, 190-221).

Respondents moved to dismiss on several grounds, including failure to state a claim and the abstention doctrine.* In their papers, the governmental respondents specifically denied petitioner's allegation that adult uses would be singled out for exclusion from the Project Area

*This action is one of approximately twenty-five state and federal lawsuits challenging the Project. To date, every case reaching resolution has upheld the validity of the Project, and sustained the public purpose. See e.g., Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corporation, 771 F2d 44 (2d Cir., 1985), pet. for cert. filed, 54 USLW 3485 (Jan. 3, 1986).

after redevelopment, and affirmatively stated that leases with developers would contain no discriminatory use restrictions on petitioner's retail establishments (A120, 138-139). Moreover, it was demonstrated that there are myriad sex related use establishments totally unaffected by the Project (A140-141, A163).

After oral argument on the applications in December, 1984, the District Court allowed counsel for petitioner to submit additional factual papers regarding its relocation problems and the City's zoning regulations (A270-277). On February 5, 1985, the District Court rendered its opinion granting respondents summary judgment and dismissing the complaint. Petitioner's application for reargument was denied on March 1, 1985.

1. The District Court Opinion

In extensive findings of fact (generally summarized supra at 3-8), most of which are not disputed, the District Court found that the Project area is crime-ridden and plagued by physical, social

and economic blight (App 31-35) which public and private ventures have failed to eradicate. The court was unable to conclude that "adult uses will be banned from the completed Project" (id.). The court rejected petitioner's argument that elimination of such uses was the primary motivation of the Project, since "it strains credibility to assert that the City and State would undertake such a massive project, involving investment of more than $1.6 billion, and displacing more than 400 businesses, in order to rid Times Square of a handful of pornographic book stores and a few adult theatres" (App. 37). Rather, applying the test articulated by this Court in Young v. American Mini Theatres, 427 US 50 (1976) and United States v. O'Brien, 391 US 367 (1968), the District Court held that the substantial and important state interests of eliminating physical and social blight, revitalizing under-utilized property and preserving historic theaters, were unrelated to the suppression of free speech and thus, the Project did not violate petitioner's rights (App 38-53).

2. The Second Circuit Opinion

The Court of Appeals unanimously concurred in the District Court findings "that the proposed condemnation . . . plan did not classify speech on the basis of content, or burden it with overly restrictive regulations . . . ." (App 3). The court noted its agreement with the District Court that petitioner's activities have not been singled out for special treatment, and rejected petitioner's statistical analysis, also urged in the Petition, regarding the effect the Project would have in closing sex related uses (App 16). The court noted that "[p]laintiffs' businesses constitute only 1% of the total number of businesses to be displaced [and] [s]ex related establishments . . . represent only 5% of all businesses displaced and 3.2% of the total gross footage to be acquired." Id.

Having found that the Project did not constitute a prior restraint since it is content-neutral, the Circuit next considered whether any alleged incidental impact on speech was justified.

Id. The Second Circuit applied the four-part test adopted by this Court in United States v. O'Brien, 391 US 369 (1968), as applied by Justice Powell in Young, supra 427 US at 79-80, and, most recently by this Court in United States v. Albertini, ___ US ___, 53 USLW 4844, 4847 (1985). Thus, the Second Circuit concluded that the "substantial governmental interests which the Project is designed to serve are unrelated to ["and independent of" (App 19)] suppression of free speech." (App 18). The court held, applying the reasoning of this Court in O'Brien, that the "subjective motivation . . . of some proponents of the Project to suppress sex-related businesses does not render it unconstitutional . . . . " (App 19). The court distinguished the Ninth Circuit opinion in Playtime Theatres Inc. v. City of Renton, 748 F2d 527 (9th Cir., 1984), jur. noted, 105 S Ct 2015 (1985), app. pndg., argued November 12, 1985, upon which petitioner relies (Petition, pps. 12-13), noting that, unlike this case, the challenged regulation in Playtime Theatres was content-based and the record

was inadequate to determine if there were substantial reasons unrelated to the suppression of speech for the adult theater zoning regulation (App 19).

The Court of Appeals held that the "city and UDC acted within the bounds of the Constitution in concluding that the use of eminent domain power would be a more effective means of achieving the Project's goals" (App 20) than the police sweeps recommended by petitioner. The court agreed with the District Court that "a substantially less restrictive plan [than that of the Project] could not be expected to fulfill the goals of the Project" (App 20), and found no basis to substitute its judgment for that of the responsible officials (App 21). Finally, on the merits, the court agreed "with the district court that 'the general availability of sexually explicit material in the midtown area will not be severely curtailed . . . because several dozen adult uses will remain within a few blocks of the Project area.'" (App 21). Moreover, the court did not agree with petitioner that it would be prevented from

effectively relocating by New York City zoning "which provides that establishments with four or more coin-operated amusement devices may locate [as of right] only in areas zoned for amusement arcades" (App 23). The court held that "the Constitution does not entitle a person to distribution of information in precisely the same form as that in use by the least expensive means of expression, as long as a comparable method is available" citing inter alia, Heffron v. International Society for Krishna Consciousness, Inc., 452 US 640, 647 (1981), and found that petitioner has readily available "numerous ... unrestricted means of exhibition purveying the same information" (App 23).

The court also rejected petitioner's procedural argument regarding the conversion of the motions into ones for summary judgment, without strict compliance with Federal Rule of Civil Procedure ("FRCP") 56. The court found that the "essential inquiry is whether the appellant should have reasonably recognized the possibility . . . [of conversion] or was taken by surprise and deprived of

a reasonable opportunity to meet facts outside the pleadings." (App 13). Recognizing that each case will turn on its own facts, the court held that petitioner had ample opportunity to, and did in fact, submit voluminous factual material outside the pleadings. Thus, petitioner could not claim surprise or lack of notice of the conversion (App 15). Accordingly, the Second Circuit affirmed the denial of the preliminary injunction and dismissal of the complaint.

REASONS FOR DENYING THE WRIT

PETITIONER HAS FAILED TO SET FORTH SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI TO REVIEW THE UNANIMOUS FINDINGS OF THE COURTS BELOW.

Petitioner's request for a writ necessarily misstates the Record* and the findings of the courts below** in an attempt to create a constitutional violation which would merit review by this Court. However, a review of the lower courts'

*For example, petitioner states that the government "order[ed] that legitimate stores replace adult uses" but cannot point to any evidence of a government official having done so. Indeed, as found by the courts below, the government "denied that any arbitrary use restrictions would be imposed to prevent plaintiffs from relocating in the retail establishments in the Project area...." (App 10, App 37). Most of petitioner's arguments rest upon a different reading of the facts than that of the courts below. Petitions for certiorari, however, are not granted to review concurrent factual findings of the lower courts. See Graver Mfg. Co. v. Linde Co., 336 US 271, 275 (1949), aff'd, 339 US 605, 609-610 (1950).

**A reading of the decisions below demonstrates that the courts' analysis went far beyond the Berman v. Parker, 348 US 26 (1954) "police power due process rationally related test." (Petition, p. 10).

decisions reveals that, upon careful consideration of all relevent factual material and application of the tests articulated by this Court on comparable First Amendment challenges, the lower courts properly determined that the Project serves substantial state interests and does not violate petitioner's rights. Petitioner, very simply, can point to no conflict or novel and important question raised by the lower courts' dismissal of its First Amendment challenge which warrants review by this Court.

A. The District and Circuit Courts Properly Applied the Young/O'Brien Test.

In United States v. O'Brien, 391 US 367, 376-377 (1968) this Court held that when a government regulation is challenged as violating the First Amendment, incidental limitations the regulation may impose can be justified if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the

incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 US at 377.

This test has been consistently applied in various contexts where there is an alleged incidental burden* on free expression caused by government action. See United States v. Albertini, __ US ___, 53 USLW 4844, 4847-4848 (1985); Clark v. Community for Creative Non-Violence, 468 US ___, 104 S Ct 3065, 3069-3072 (1984); Members of City Council v.

*Petitioner's attempt to categorize the Project as more than an incidental burden cannot be justified under any reading of the facts, and, indeed, was rejected by both courts below in granting summary judgment (App 21-23, App 48). Despite petitioner's diminution argument, there simply will not be any significant curtailment in MJM's ability to purvey its message, nor in the public's access to view sexually explicit films. Id. Moreover, petitioner's argument that New York City zoning prevents relocation is not only irrelevant, it is wrong. The sole restriction in New York City zoning is that any business with more than four coin operated machines, (such as pinball, video, or peep machines) can only locate as of right in areas zoned for amusement arcades. However, petitioner can relocate in most commercial districts throughout the city if there is a maximum of four coin-operated machines on the premises.

Vincent, ___ US ___, 104 S Ct 2118, 2129-2132 (1984); Young v. American Mini Theatres, 427 US 50, 73-84 (1976) (Justice Powell concurring). Accordingly, the O'Brien test, as synthesized by Justice Powell in Young, which upheld a content-based amendment to a Detroit zoning ordinance restricting the location of adult movie theaters, is the appropriate analysis to be applied to petitioner's claim.*

It is clear that the courts below correctly applied the Young/O'Brien test to the undisputed facts in determining that petitioner's rights have not

*This Court has rejected application of the Young/O'Brien test when the government specifically imposes a total or near total ban on a broad category of protected activity, [Schad v. Borough of Mount Ephraim, 452 US 61, 71-72 (1981)], which was not the case in Young. Nor is it this case. Here, sex related uses constitute only 5% of the businesses being condemned and the "general availability of sexually explicit material . . . will not be severely curtailed" (App 21). Thus, petitioner's assertion (Petition, pps. 49, 9-10) that the Second Circuit improperly ignored Schad (and the cases which follow it, see infra, p. 28) is without merit; here, judicial deference to the State's substantial interest in eliminating blight was clearly appropriate.

been violated. With respect to the first and second O'Brien criteria, there is no question that the condemnation plan is within the constitutional powers of the governmental respondents. Hawaii Housing Authority v. Midkiff, ___ US ___, 104 S Ct 2321 (1984); Berman v. Parker, 348 US 26 (1954). Nor is there any question that the Project will further the important and substantial governmental interests of (1) eliminating blight, (2) redeveloping a severely underutilized area, and (3) preserving theaters of architectural and historical significance.* Young, supra, 427 US at 71 ("the city's interest in attempting to preserve the quality of urban life must be accorded high respect.");

*The findings of blight and underutilization in the Project area are the results of substantially documented studies, carried out over a number of years, which are referenced in the FEIS. Thus, this case is not like those cited by petitioner at page 10, where the court was dealing with an "empty" record to support the proposed governmental interests [Basiardanes v. City of Galveston, 682 F2d 1203, 1215 (5th Cir., 1982)]; or with post hoc justifications for the proposed governmental interests, [Keego Harbor Co. v. City of Keego Harbor, 657 F2d 94, 98 (6th Cir., 1981)].

Members of City Council v. Taxpayers for Vincent, ___ US ___, 104 S Ct 2118, 2129 (1984) ("the state may legitimately exercise its police powers to advance esthetic values."). The Project will attack those problems by new office construction, by improving the subway system and stations, and by restoring historic theaters to their original grandeur. Thus, the Project will bring to fruition the stated goals of revitalizing Times Square by bringing thousands of office workers, shoppers, and theater patrons back into the neighborhood, while at the same time significantly increasing the area's tax base.

The third O'Brien standard is met since these goals are clearly unrelated to the suppression of free expression. The Project plan, neither on its face nor in operation, puts adult uses out of business on the basis of the content of the material they purvey. See contra, Schad v. Borough of Mount Ephraim, 452 US 61 (1981) (where all live entertainment was banned from the entire borough without sufficient state interests justifying the ban).

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Indeed, 406 businesses will be condemned to achieve these important and substantial interests. The fact that as a result of the Project less than 5% of the businesses within a few block area of the City which engage in activities protected by the First Amendment are also subject to displacement does not alter this result, even though the District Court found some evidence of hostility toward adult uses.

In O'Brien, supra, 391 US at 387, this Court upheld a statute prohibiting destruction of draft registration certificates on the ground that Congress had a substantial interest in their continuing availability. The Court reached this result even though there was evidence in the legislative record regarding "defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy." Id. Having found a substantial basis for the statute, the Court simply refused to inquire into legislative motives or purposes, finding such to be a "hazardous matter." Id. at 383.

Similarly, in Young, Justice Powell found the content-based amendment justified because the legislature's well-documented interest of protecting the commercial districts from the deterioration engendered by the concentration of regulated uses, was unrelated to the suppression of free expression. 427 US at 80-81. This conclusion was reached even in the face of some evidence that the amendment was in response to the significant growth in the number of adult theaters in Detroit, which in five years had grown from 2 to 25. 427 US at 54-55. In light of this Court's rulings in O'Brien and Young, even in the face of the finding of hostility to adult uses, it is clear that the lower courts properly concluded that there are substantial state interests unrelated to the suppression of free expression which justify any incidental burden on petitioner's exercise of its First Amendment rights.

Finally, the last part of the O'Brien test is met since the condemnation plan is "no greater than is essential" and would be achieved much "less effectively" by implementing the police sweeps

suggested by petitioner. See United States v. Albertini, supra, 53 USLW at 4848. The government respondents have determined that the area can only be renewed through a wholesale approach to the problem, i.e., condemnation. This finding is entitled to great deference. Clark v. Community for Creative Non-Violence, supra, 104 S Ct 3065; Young v. American Mini Theatres, supra, 427 US 50. It is unchallenged that numerous plans to revitalize the Times Square area have failed (A152, FEIS 1-1). Although a few sites surrounding the Project area have been developed by private industries in recent years, because of the extensive blight in the Project area, as well as the diversity of ownership, the area has not been attractive to independent, private development (A153-154). The broad purposes of the Project simply could not be achieved by police sweeps, as petitioner suggests, because, as the District Court found, that course focusses only upon one of the many factors that contributes to the blight, and with limited success at that (App 48).

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Moreover, these alternatives need not be considered because it has been held that when dealing with the exercise of the sovereign right of eminent domain:

> It is not for the courts to oversee the choice of the boundary line or to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and the character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.*

Berman v. Parker, 348 US 26, 35-36 (1954). See also Clark v. Community for Creative Non-Violence, supra, 104 S Ct 3065, 3072 (deference to Park Service as to "how much protection of parklands is wise and how that level of conservation is to be

*Thus, petitioner's argument that the documents do not demonstrate a connection between M.J.M.'s business and the findings of blight, is not controlling. It cannot be gainsaid, and indeed petitioner has admitted, that the entire block upon which its business is located is blighted (A245-246), and piecemeal condemnation will not achieve the Project's goals.

attained.") Thus, the 42nd Street Development Project passes muster under the strictures of the Young/O'Brien test.

Petitioner's plea for a writ cites numerous cases where the courts, applying the Young/O'Brien test, have struck down the challenged regulation. However, it is clear that the contrary results in the cited cases are caused not by a conflict in the legal analysis applied, but rather, by the factual record (or lack thereof) in support of the stated legislative interests, or, by the overly restrictive impact the regulation might have (such as a total or a near total ban) upon the First Amendment uses. See Playtime Theaters, Inc. v. City of Renton, 748 F2d 527 (9th Cir., 1984), app. pndg., ___ US ___; compare Star Satellite, Inc. v. City of Biloxi, ___ F2d ___ (5th Cir., Jan. 3, 1986) (upholding adult use zoning restriction under Young/O'Brien analysis). Petitioner's citations at page 16 in support of its claim that virtually every "retroactive zoning regulation," except the one at bar, has been struck down, are inapposite; the 42nd Street Development

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Project is a condemnation plan and not a "retroactively applied zoning regulation." Thus, the purported need for clarification does not exist; the courts below properly determined under clearly established First Amendment principles that petitioner's rights have not been violated.

B. The Second Circuit Decision, Affirming the Grant of Summary Judgment, Does Not Merit Review By This Court.

In affirming the grant of summary judgment, the Second Circuit held that under these facts, the District Court's failure to expressly notify the parties of its intent to treat the motion as one for summary judgment, did not warrant a remand* to

*Indeed, a remand in this case would serve no purpose since there is no other factual material petitioner could possibly submit which would affect the outcome of its claim. Petitioner's argument that if given an opportunity for discovery, it might be shown that the "City deliberately did not use the proven successful measure of police sweeps in the Project area in order to justify condemnation" (Petition, p. 18) is of no consequence. The courts below found that police sweeps would be less effective than the condemnation plan, and thus, are not required by this Court's holding in O'Brien. See App 20, citing, US v. Albertini, ___ US ___, 53 USLW at 4848; App 48.

comply with the technical requirement of notice. The court held that a "party cannot complain of lack of a reasonable opportunity to present all material relevant to a motion for summary judgment when both parties have filed exhibits, affidavits, counter-affidavits, depositions, etc. in support of and opposition to a motion to dismiss" (App 14, citation omitted). In effect, the Circuit held, and properly so, that petitioner had notice of and indeed, caused the conversion to summary judgment, in light of the extensive factual materials (including the FEIS and factual affidavits) submitted by petitioner and its co-plaintiffs. Thus, the result in this case is not in square conflict with the decisions in other circuits (see Petition, p. 19) where the courts have held that a remand is necessary in order to avoid surprise and afford a party a reasonable opportunity to present all available material which would demonstrate a genuine issue of material fact. Since petitioner has had that opportunity, treatment of the motion as one for summary judgment was appropriate. Cf. Romero v. International Terminal Operating Co.,

358 US 354, 357, n.4 (1959).

To the extent it can be argued that a conflict exists on the question whether FRCP 12 and 56 require technical compliance, as opposed to substantial compliance, with the notice provision, that is not an issue which merits review by this Court, particularly on the undisputed facts in this case.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

January 29, 1986.

Respectfully submitted,

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